

GUARANTEED ENERGY SAVINGS PERFORMANCE CONTRACT

THIS GUARANTEED ENERGY SAVINGS PERFORMANCE CONTRACT (herein sometimes “Agreement” and sometimes “Contract”), made this day ____ of _____ 2015, by and between **City of West Lafayette**, Indiana, a municipal Corporation (hereinafter called “City” or “Owner”) and Bowen Engineering, an Indiana corporation (hereinafter called “Contractor”),

WITNESSETH:

WHEREAS, Contractor has submitted to Owner a proposal (the “Proposal”) for the installation of energy related upgrades at facilities owned by Owner and located in Tippecanoe County, Indiana (herein the “Facilities”), the specific details of such Proposal are outlined in the Exhibits attached to this Agreement; and

WHEREAS, Owner has accepted the terms of the Proposal, and the Owner and Contractor desire to enter into this Agreement in order to memorialize their respective agreements and undertakings with respect to the Project (as defined hereinafter).

NOW, THEREFORE, in consideration of the mutual covenants, promises, and agreements herein contained, the parties hereto agree as follows:

1. Integration; Conflict; Agreement Conditional.

The parties hereby incorporate by reference the same as if fully set forth herein, the following documents and instruments, all of which together are herein referred to as the “Contract Documents”:

- Exhibit A Scope of Work
- Exhibit B Proposal & Open Book Structure
- Exhibit C Performance Guarantee
- Exhibit D Support Services
- Exhibit E Project Completion Schedule
- Exhibit F Final Acceptance Certificate

The Contract Documents also shall include any permissible change orders issued pursuant to this Agreement and signed by an authorized representative of each of City and Contractor.

In the event there is a conflict between the provisions of this Agreement and any other Contract Document, the provisions of this Agreement shall be controlling with respect to the subject matter hereof.

2. Scope of Project.

For purposes hereof, the term "Project" shall mean and include the installation of the energy conservation measures and related upgrades ("ECM's" or "Energy Conservation Measures") at the Owner's Facilities as **described in Exhibit A.**

The Contractor represents (i) that the Project constitutes the installation of "energy conservation measures" as defined in I.C. 36-1-12.5-1 *et seq.* (herein the "Act"), and (ii) that this Agreement is a "guaranteed energy savings contract" as defined in the Act. The Contractor further represents that it is a "qualified provider" of "energy conservation measures", as defined in the Act. The Contractor also represents that it has issued the report containing all data and information required by I.C. 36-1-12.5-6.

The Contractor further represents that the Project will result in energy savings in the total amount of **\$28,980** and operational savings in the total amount of **\$32,469,540** during the twenty (20) year period following completion of the Project. The Contractor represents that such total savings in the amount of **\$32,498,520** (herein the "Total Guaranteed Savings") exceeds the Owner's total cost of the Project. The Contractor hereby guarantees that it will reimburse the Owner for the difference between the Total Guaranteed Savings and the actual savings realized by virtue of the installation of the Energy Conservation Measures. The Total Guaranteed Savings are identified on Tables 1 through 6 attached to this Agreement and Savings Calculation documents, also attached to this Agreement (all of the foregoing, collectively, the "Savings Documents"). The Savings Documents are hereby incorporated into and made a part of this Agreement by this reference. The parties stipulate and agree that the operational, energy savings shall be considered fully satisfied upon the Owner's Final Acceptance of the Project (as defined hereinafter). The energy and operational savings will be realized over a period of twenty (20) years following final installation of the Project, which term of years the Contractor represents is less than the average life of the Energy Conservation Measures. The term of this Agreement shall extend for twenty (20) years effective with the Owner's acceptance of all Energy Conservation Measures.

3. General Obligations and Rights of Contractor.

Unless otherwise expressly provided herein or directed in writing by Owner, Contractor shall do all acts and provide all things necessary to perform and complete the Project properly, efficiently, in a good and workmanlike manner, and in compliance with all laws and regulations. Contractor shall apply for, secure, and obtain all necessary permits, fees, and licenses, which may be required in connection with the Project.

Contractor shall preserve and maintain, to the greatest extent possible and consistent with good engineering and design, the natural terrain and existing trees on the real estate, and shall remove only those trees necessary for the location of the Structure and approved by Owner for removal.

Contractor shall commence the work immediately in accordance with the Specifications and Drawings, General Conditions and Supplementary Conditions (each as defined in Exhibit A) and shall diligently prosecute and complete the Project without interruption in accordance with the Project Completion Schedule attached hereto as **Exhibit E**, subject only to work stoppages or

delays due to acts of God and other causes beyond control of Contractor and not the fault of Contractor. Time is of the essence of this Contract.

Contractor shall not permit any liens for labor, materials or equipment performed or furnished in connection with the Project to be filed against the Facilities or any real estate of Owner by any person, firm or corporation and Contractor shall indemnify, defend and hold Owner and the Real Estate harmless from and against any and all such other liens, claims, suits, liability or expense (including, without limitation, attorney's fees) resulting therefrom. Contractor further agrees that upon the completion of the performance of this Contract, the Facilities and all real estate of Owner shall be free and clear of any mechanic's and materialmen's liens, not only of the Contractor but also of any and all permitted subcontractors, suppliers, materialmen, laborers or permitted sub-subcontractors, who may furnish any labor, material, services, fixtures, apparatus, machinery, equipment, improvements, repairs or alterations in connection with, or to, the Facilities, in connection with the Project referred to in this Contract.

3.1. Contractor's Representations.

Contractor hereby represents and warrants to Owner that all materials furnished by Contractor, if any, and all workmanship performed by Contractor in connection with the Project, shall be in accordance with the general industry standards of the mechanical and electrical construction industry; shall be performed in a competent, good and workmanlike manner on a timely basis and in compliance with the Contract Documents, and all pertinent laws, rules and regulations; and shall be free from any and all faults or defects in material and workmanship. Contractor further represents and warrants that the completed Project shall be suitable, fit, and capable for the intended use and purpose thereof, according to the Contract Documents. Contractor shall promptly remedy any and all defective materials or workmanship furnished by Contractor upon receipt of written notice thereof from Owner. If required by Owner, Contractor shall furnish satisfactory evidence as to kind and quality of materials and equipment used in connection with the Project.

The representations and warranties set forth herein (including, without limitation, in the incorporated Specifications and Drawings, General Conditions and Supplementary Conditions) shall continue to be effective for a period of one (1) year following Substantial Completion of the Energy Conservation Measures, after which Contractor shall thereafter be relieved of all responsibility and liability under this representation and warranty, excluding Contractor's liability for claims that arose during the warranty period. Owner shall give Contractor written notice of all defective work, specifically detailing the deficiencies to be corrected, and Contractor shall repair or otherwise remedy such defective work in an expeditious manner.

CONTRACTOR MAKES NO OTHER REPRESENTATIONS, EXPRESS OR IMPLIED, OTHER THAN THOSE REPRESENTATIONS SPECIFICALLY STATED IN THIS AGREEMENT. To the extent possible, Contractor shall assign to Owner all representations that Contractor receives from its vendors and/or subcontractors which are or are to become permanent features of the Project.

3.2. Approvals.

Upon completion of the Project, the Contractor shall obtain approval of the installation of the Energy Conservation Measures constituting the Project from the Indiana Department of Health, the Office of the State Fire Marshal, the Office of the State Building Commissioner, and any other State agency designated by the Act or any other State statute or regulation. The installation of the Energy Conservation Measures constituted in the Project also shall be approved by an architect or engineer licensed under I.C. 25-4 or I.C. 25-31, such approval to be obtained at the expense of the contractor. The receipt of all such approvals (together collectively, the "Approvals") shall constitute a condition precedent to the Contractor's entitlement to receive the final payment of the Contract Price (as defined hereinafter) and the payment of all Retainage (as defined hereinafter) withheld with respect to each installment payment of the Contract Price.

3.3. Indemnification.

Contractor shall indemnify and hold harmless the Owner, its agents, employees and representatives, and their respective successors and assigns, and any assignee of the Contractor (all of the foregoing, collectively, the "Owner Indemnified Parties") against all liability and loss as a result of negligence or misconduct in connection with the Project by Contractor, its permitted subcontractors, or the agents, employees, or representatives of Contractor or its permitted subcontractor(s), including any injury or death sustained by or any damage to the property of any person; provided however, that Contractor shall not be responsible for any injury or death, damage, or loss, including reasonable attorneys' fees and costs or other disbursements, to the extent caused by the negligence of any Owner Indemnified Parties, nor shall Contractor be held responsible to the extent of any concurrent or contributory negligence of any Owner Indemnified Parties or non-party.

Contractor shall be liable for, and agrees to indemnify, save and hold Owner Indemnified Parties, harmless from the payment of any sum of money whatsoever (including reasonable attorneys' fees and expenses) on account of any laborer's, mechanic's, materialman's or any other lien against Owner's Facilities and property related to Contractor's performance of the Project, unless the lien is caused solely by some fault of Owner or some person or entity acting on Owner's behalf.

Owner shall indemnify, defend (at Owner's option) and hold harmless Contractor, and the officers, shareholders, directors, and employees of the Contractor (herein the "Contractor Indemnified Parties") against all liability and loss as a result of the negligence or misconduct in connection with the Project by Owner and agents, employees or representatives of Owner, including any injury (including death) sustained by or any damage to the property of, any person; provided, however, that Owner shall not be responsible for any injury (including death), damage or loss (including reasonable attorneys fees and disbursements) to the extent caused by the negligence of any Contractor Indemnified Parties, nor shall Owner be held responsible to the extent of any concurrent or contributory negligence of any Contractor Indemnified Parties.

In no event shall either Party's legal right to the use of contributory negligence as a defense or limitation of liability be limited or otherwise affected.

3.4. Bonds.

Before entering upon the performance of this Agreement, the Contractor shall execute for the benefit of Owner, a good and sufficient Performance Bond and Payment Bond, in form acceptable to Owner. Each bond shall be in an amount equal to the total Contract Price (as defined below in Section 5 of this Agreement), and the provisions of I.C. 36-1-12-13.1 and I.C. 36-1-12-14, if applicable to this Project, shall become a part of the terms of such bonds.

Notwithstanding any other provision of this Agreement or the bonds, in no event and in no manner shall coverage under the Performance Bond and Payment Bond extend to Contractor's guaranty obligations set forth in Exhibit C Performance Guarantee, or any related provisions.

3.5. Limitation of Liability.

Except for Contractor's guaranty obligations, the negligence, willful misconduct or recklessness of a party, a party's indemnification obligations under this Agreement (or breach thereof) or for any claims for bodily injury, death or damage to real or personal property, the total liability of either party to the other on all claims, whether in contract, warranty, tort, strict liability, or otherwise, arising out of the performance of this Agreement, shall not exceed the Contract Price. EXCEPT FOR THE NEGLIGENCE, WILLFUL MISCONDUCT OR RECKLESSNESS OF A PARTY, A PARTY'S INDEMNIFICATION OBLIGATIONS UNDER THIS AGREEMENT (OR BREACH THEREOF), INTEREST COSTS OR OTHER COSTS WHICH OWNER MAY INCUR AS A RESULT OF CONTRACTOR'S FAILURE TO COMPLETE THE PROJECT IN A TIMELY MANNER, OR FOR ANY CLAIMS FOR BODILY INJURY, DEATH OR DAMAGE TO REAL OR PERSONAL PROPERTY, IN NO EVENT WILL EITHER PARTY BE LIABLE TO THE OTHER PARTY FOR INDIRECT, CONSEQUENTIAL, SPECIAL, SPECULATIVE, PUNITIVE, OR REMOTE DAMAGES, .

3.6. Insurance. Not used. See General Conditions and Supplementary Conditions Article 5.

3.7. Environmental Protection.

Contractor shall perform all work in connection with the Project in an environmentally sound manner and shall strictly comply with all environmental protection laws and legal requirements, including, but not limited to, statutes and regulations governing the handling, generation, transportation, and disposal of hazardous waste.

Except as provided in the immediately following paragraph, should any discharge, leakage, spillage, emission, or pollution of any type (hereinafter called "Pollution") occur upon or from the Facilities due to the fault of Contractor or its subcontractors, Contractor shall clean or otherwise re-mediate such site and any other lands upon which Pollution occurs, to the satisfaction of Owner and any governmental authority having jurisdiction. Such re-mediation shall be performed by Contractor or someone hired by Contractor, at its sole cost, risk and expense, and Contractor shall indemnify, defend and hold harmless Owner from and against all loss, costs, liability, expenses, judgment, fine, and/or penalty imposed upon or assessed against Owner as a result of any Pollution or the remediation caused by Contractor or its subcontractors; provided, however, that the foregoing shall not prevent Contractor from seeking contribution or indemnity from any other party bearing full or partial responsibility for said Pollution; and provided further, Contractor's

recourse against Owner shall be limited to Owner's own direct contribution to the occurrence of the Pollution.

4. Building Insurance.

The Owner's fire and extended coverage insurance now in effect on the Facilities will cover the Owner's interest or equity in the Project; however, it will not cover the equity or interest of the Contractor nor of its materials and/or equipment at the Facilities. The coverage of the Contractor's equity and/or interest, as above, shall be the responsibility of the Contractor.

4.1. Title.

Title to all Energy Conservation Measures shall vest with the Owner upon Owner's Final Acceptance and approving payment to the Contractor. Such title shall continue to be subject to the provisions of this Agreement. It is the intent of all parties that any transfer of title to Owner pursuant to this Agreement shall occur automatically without the necessity of any bill of sale, certificate of title, or other instrument of conveyance.

The Owner shall be responsible for operating, maintaining, and insuring all Energy Conservation Measures that are installed, except as otherwise set forth in Agreement, from and after the date of Owner's Final Acceptance.

5. Contract Price and Payments.

5.1. Contract Price.

In consideration of Contractor's performance of the work necessary for the completion of the Project, Contractor shall be paid sums not to exceed the amounts **described in Exhibit B and Exhibit B-1** (herein the "Contract Price). Any cost and expense for the installation of the Project in excess of the Contract Price shall be and remain the sole and exclusive liability and obligation of Contractor, unless such additional cost results from the issuance of a change order by Owner that is approved by Contractor and signed by an authorized representative of Contractor and Owner.

By executing this Contract, Contractor represents that it has taken steps reasonably necessary to ascertain the nature and location of the Project, and that it has investigated and satisfied itself as to the general and local conditions which can affect the Project or its costs, and has included provision for all such conditions in the Contract Price, including but not limited to: (1) conditions bearing upon transportation, disposal, handling, and storage of materials; (2) the availability of labor, water, electric power, and roads; (3) uncertainties of weather, river stages, or similar physical conditions at the Site; (4) the conformation and conditions of the ground; and (5) the character of equipment and facilities needed preliminary to and during performance of the Project. Contractor also represents that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the Facilities, including all exploratory work done by City, as well as from the specifications made a part of this Contract. Failure by Contractor to take the actions described and acknowledged in this paragraph will not relieve Contractor from responsibility for estimating properly the difficulty and cost of

successfully performing the Project, or for proceeding to successfully perform the Project without additional expense to City.

Prior to Substantial Completion (as defined in the General Conditions), the Owner shall retain 10 percent of the amount of each payment for the work completed. If the work has been 50 percent completed as determined by Engineer, and if the quality and progress of the work have been satisfactory to Owner and Engineer and in accordance with the Contract Documents, Owner, on recommendation of Engineer, may determine that as long as the quality and progress of the work remain satisfactory to them and in accordance with the Contract Documents, there will be no additional retainage; and 50 percent of cost of materials and equipment not incorporated in the work (with the balance being retainage). Upon Substantial Completion, Owner shall pay an amount sufficient to increase total payments to Contractor to 100 percent of the work completed, less such amounts as Engineer shall determine in accordance with Paragraph 14.02.B.5 of the General Conditions and less 200 percent of Engineer's estimate of the value of work to be completed or corrected as shown on the tentative list of items to be completed or corrected attached to the certificate of Substantial Completion.

Owner shall make progress payments on account of the Contract Price on the basis of Contractor's applications for payment on or about the 15th day of each month during performance of the Project. All such payments will be measured by the schedule of values established as provided in Paragraph 2.07.A of the General Conditions

Contractor shall include in each permitted subcontract a limitation on the markup that Subcontractors can include in approved Change Orders. The cumulative total of markup (subcontractor markup plus all lower-tier subcontractor markups) shall not exceed fifteen percent (15%) of the cost of any approved Change Order. As Contractor's markup is accounted for in the fixed fee, there will be no additional Contractor's markup for changes in scope associated with Owner approved work that expends project savings and contingency dollars.

5.2. Completion and Inspection; Acceptance.

Completion and inspection will be in accordance with the Specifications and Drawings, General Conditions and Supplementary Conditions. In addition, Owner will not give Contractor notice of acceptance, **as described Exhibit F**, until Contractor has obtained all Approvals, as required by I.C. 36-1-12.5.

6. Independent Contractor.

It is understood and agreed by the parties hereto that Contractor shall perform the Project according to its own means and methods and shall for all purposes be an independent contractor. All persons employed by Contractor in connection with the Project shall be subject only to its orders and supervision, and shall be paid directly by Contractor. Neither Owner nor its agents, servants, or employees shall have the right to direct, supervise, or control the manner or method in which Contractor or its subcontractors perform the Project, except as otherwise expressly provided herein; provided, however, Owner shall have the right to inspect the Project at any time for the

purpose of determining whether the Project is being carried out in conformity with the Contract Documents.

7. Inspection; Defective Work.

The Contractor shall provide sufficient, safe, and proper facilities at all times for the inspection of the work by Owner. Contractor shall, within twenty-four (24) hours after receiving written notice from the Owner's Authorized Representative to that effect, proceed to remove from the Facilities all materials, which fail to conform to the Contract Documents.

Contractor shall retain in its records copies of all plans, specifications, submittals, correspondence, minutes, memoranda, tape recordings, videos, accounting records, documents reflecting the unit price of construction and other writings or things which document the Project, its design, and its construction. Contractor shall maintain substantiating records for seven (7) years after the date of final payment or for any longer period of time as may be required by law or good construction practice. Contractor shall promptly make such records available for inspection by City upon request during such retention period. If Contractor receives a notification of dispute or the commencement of litigation regarding the Project within this seven (7) year period, Contractor shall continue to maintain all Project records until final resolution of the dispute or litigation.

8. Termination for Failure to Perform; Rights Thereunder.

The Contractor shall use all due diligence in an effort to complete the entire work required by this Contract within a minimum period of time. Should the Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen or materials of the proper quality, or fail to prosecute the work with promptness and diligence, the Owner shall be at liberty, after thirty (30) days written notice to the Contractor and Contractor's failure to remedy the problem within that time period, to provide any such labor or materials and to deduct the costs thereof from any money then due or thereafter to become due to the Contractor under the Contract, and the City shall also be at liberty to terminate this Agreement with the Contractor for the Project and to enter upon the Facilities and take possession for the purpose of completing the work to be done under this Contract, to use all materials of the Contractor available for such work, and to employ any other person or persons to finish the work and to provide such additional materials therefore as may be necessary; and in case of such discontinuance of the employment of the Contractor, the Contractor shall not be entitled to receive any further payment under this Contract until the said work shall be wholly finished, at which time if the unpaid balance of the amount to be paid under the Contract shall exceed the expense incurred by the Owner in finishing the work, such excess shall be paid by the Owner to the Contractor, but if such expense shall exceed such unpaid balance, the Contractor shall pay the balance to the Owner. The expenses incurred by the Owner as herein provided, either for the furnishing of materials or for finishing the work, and any damage incurred through such fault of the Contractor shall be certified by the Owner, and payment shall be made upon such certification.

9. Extension of Time for Completion of Project.

Should the Contractor be obstructed or delayed in the prosecution or completion of the Project by the act, negligence, delay, or default of the City or by any other damage or act beyond

the reasonable control of Contractor or any subcontractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid, but no such allowance shall be made unless a claim therefore is presented in writing to the Owner within two (2) business days of the occurrence of such delay. Contractor's nonperformance of its obligations under this Agreement will be excused (or, if practicable, the time period within which Contractor may perform an obligation shall be extended) if and solely to the extent: (i) Contractor's failure to perform, or failure to timely perform, an obligation results from Owner's failure to perform or failure to timely perform its responsibilities, (ii) Contractor provides Owner with prompt and reasonable notice of Owner's nonperformance, and (iii) Contractor uses commercially reasonable efforts to perform its duties notwithstanding Owner's failure to perform.

10. No Acceptance of Defective Work.

No certificate given or payment made under this Contract, except the final certificate and final payment thereon, shall be conclusive evidence of the performance of this Contract either wholly or in part; provided, that no payment or certificate, including, without limitation, the final payment and certificate, shall be construed to be an acceptance of defective work, improper materials or unauthorized substitutions.

11. City to be Held Harmless.

City shall not in any manner be answerable or accountable for any violation of the City ordinances or state or federal law by the Contractor or of anyone in its employ, nor for any loss or damage arising from negligence of the Contractor, or anyone in its employ, to any person or persons and their property, and the Contractor agrees to make good to the Owner any loss, damage, or expense incurred by the Owner by reason of any such violations or negligence, on the part of the Contractor or anyone in its employ, including any subcontractor, together with reasonable attorneys' fees.

12. Contractor to Furnish Required Statements.

The Contractor shall, at no additional cost, provide all statements, affidavits, waivers, and other instruments required by state or federal law or regulation (including, without limitation, the Act) or by City ordinances or rules, at such times and in the form required by said laws, regulations, ordinances, or rules, and the Contractor hereby acknowledges receipt of notice from the Owner to furnish same.

13. Nondiscrimination in Hiring Employees.

The Contractor, as required by I.C. 5-16-6-1 *et seq.* and I.C. 22-9-1-10, shall comply with the following:

A. The Contractor, any subcontractor, any supplier or any sub-supplier of a party to this Contract shall not discriminate against any employee or applicant for employment to be employed in the performance of this Contract with respect to his or her hire, tenure, terms, conditions, or privileges of employment or any matter directly or indirectly related to employment,

because of his race, color, religion, sex, disability, national origin, or ancestry. Breach of this provision may be regarded as a material breach of this Contract.

B. This Contract involves the construction, alteration, or repair of a public building or public work, therefore the Contractor further agrees:

(1) That in the hiring of employees for the performance of work under this Contract or any subcontract hereunder, the Contractor, subcontractor or any person acting on behalf of the Contractor or subcontractor shall not, by reason of race, religion, color, sex, national origin, or ancestry, discriminate against any citizen of the State of Indiana who is qualified and available to perform the work to which the employment relates;

(2) That the Contractor, a subcontractor, or any person on his or their behalf shall not, in any manner, discriminate against or intimidate any employee hired for the performance of work under this Contract on account of race, religion, color, sex, national origin, or ancestry;

14. Applicable State Laws Part of Contract - Conflict With Laws.

This Contract shall include in its terms all of the applicable laws of the State of Indiana, and any provision of this Contract, including the plans and specifications, which are a part of this Contract in conflict with the laws of the State of Indiana, are hereby declared to be inoperative, but the invalidity of any part of this Contract shall in no way affect the validity of the remainder of this Contract insofar as permitted by law. Special attention of the parties hereto is called to the I.C. 5-16-5-1 *et seq.*, as amended, I.C. 5-16-7-1 *et seq.* as amended, and I.C. 36-1-12.5-1 *et seq.* as amended, which, together with all other applicable laws, are part of this Contract.

15. Miscellaneous Provisions.

15.1. Governing Law.

This Agreement shall be construed in accordance with and governed by the laws of the State of Indiana.

15.2. Notices.

Unless otherwise specifically provided herein, any notice, consent, request, demand, report or statement (herein "Notice"), which is required or permitted to be given to or served upon either party hereto by the other party hereto under any of the provisions of this Agreement shall be in writing and deemed to be duly delivered when (i) personally delivered to the addressee, in the case of a Notice to be given to Contractor, or personally delivered to the addressee in the case of a Notice to be given to Owner, or (ii) upon the earlier of actual receipt or refusal of delivery when sent via traceable overnight courier (e.g., FedEx) or when sent in the United States mail, registered or certified, postage prepaid, and properly addressed as follows:

If to Owner: David M Buck, Public Works Dir.
City of West Lafayette
609 West Navajo Street

West Lafayette, IN 47906-1937

If to Contractor: Jim Ankrum, Sr. Vice President
Bowen Engineering Corporation
8802 N. Meridian Street
Indianapolis, IN 46260

15.3. Claims for Damages.

Any claims by either party hereto for bodily injury or damage to personal property caused by any act or omission of the other party hereto or by any of such party's employees or agents or others for whose acts it is legally liable shall be made in writing to such other party within a reasonable time after the occurrence or first knowledge of such injury or damage.

15.4. Assignment.

Without City's prior written consent, Contractor shall not, and will not, assign, subcontract, transfer, pledge, hypothecate, or grant any security interest in, or otherwise dispose of, this Agreement, or any portion of this Agreement.

Contractor, without the consent of the City, may assign its right to receive payment hereunder in whole or in part to various assignees, their agents or trustees (each and any one hereinafter referred to as an "Assignee"). Any such assignment to an Assignee may provide that Contractor or the Assignee shall act as a collection and paying agent for holders of certificates of participation in this Agreement, or may provide that a third party trustee or agent shall act as a collection and paying agent for any Assignee, provided City receives written notification of the name and address of the trustee or the agent and a copy of the pooling and fractionalization agency or trustee agreement, if any such Assignee shall have all or a part of the assigned rights of Contractor under this Agreement. Subject to the foregoing, this Agreement shall inure to the benefit of and is binding upon the heirs, executors, administrators, successors, and assigns of the parties hereto. Any assignment or reassignment of any of Contractor's right to receive payment hereunder shall be effective upon receipt by City of a duplicate original of the counterpart document by which the assignment or reassignment is made, disclosing the name and address of each such Assignee, and where applicable, to whom further payments hereunder should be made. City agrees to acknowledge, in writing, any assignments if so requested.

City agrees that, upon notice of assignment of payment rights, if so instructed, it shall pay directly to the Assignee, or its Trustee or Agent without abatement, deduction or setoff (except as permitted by this Agreement), all amounts, which become due hereunder.

Contractor does hereby assign to City, to the greatest extent permitted by law, all warranties of any manufacturer of supplies, equipment, and all other materials used in the performance of the Project. Contractor agrees to use reasonable efforts to assist City in seeking any redress under any such warranties.

15.5. Nonwaivers and Defaults.

The failure of either party hereto to insist upon strict performance of any of the provisions of this Agreement or to take advantage of any of its rights hereunder shall not be construed as a waiver of any such provision or the relinquishment of any such rights. Except as otherwise expressly provided herein, no default by either party hereto in the performance of any of its covenants or obligations hereunder, which except for this provision would be the legal basis for the rescission or termination hereof by the other party hereto, shall give or result in such a right unless and until the party committing such default shall fail to correct the same within fifteen (15) calendar days after written notice thereof is given to such defaulting party by the other party hereto.

15.6. Remedies Cumulative.

Each remedy provided for by the Contract shall be cumulative and in addition to every other remedy provided for herein, by law or in equity.

Upon the occurrence of a default, hereunder and subject to the provisions of Section 10 hereof, either party, or its assignee, may, at its option, exercise any right, remedy, or privilege which may be available to it under applicable law, including the right to (i) proceed by appropriate court action to enforce the terms of this Agreement, (ii) recover damages for breach of this Agreement. Notwithstanding the exercise of any right, remedy or privilege, the parties shall remain liable for all covenants and indemnities under this Agreement, and for all legal fees and other costs and expenses, including court costs, incurred with respect to the enforcement of any of the remedies listed above or any other remedy available to either party to this Agreement.

Except as otherwise provided in this Contract, in the event of a claim, controversy or dispute between City and Contractor, the performance of any portion of the Project, the delivery of any materials, the payment of disputed monies or otherwise (the parties acknowledging that undisputed monies will be paid when due), City and Contractor agree that pending the resolution of such claim, controversy or dispute, City and Contractor shall continue to perform their respective obligations under this Contract without interruptions or delay, and Contractor agrees not to directly or indirectly stop or delay the performance of the Project, including the delivery of materials to the Facilities.

Notwithstanding anything herein to the contrary, in the event litigation is commenced to enforce any term or condition herein, the prevailing party in such litigation shall be entitled to reasonable litigation costs and expenses including a reasonable attorney fee.

15.7. Tests.

If the Contract Documents or the laws, ordinances, rules, or regulations of any public authority having appropriate jurisdiction require inspection, testing, or approval of any of the work, Contractor shall give the Owner timely notice of Contractor's readiness for such inspection, testing, or approval and of the date thereof so that the Owner may be present to observe such inspection, testing, or approval by such public authority. Contractor shall be responsible for and pay all costs for any such inspection, testing, or approval unless otherwise provided for herein. All required licenses, permits, or certificates applicable to any such inspection, testing, or approval shall be obtained by Contractor and promptly delivered to Owner's Authorized Representative.

The obligations of Contractor under this Section 15.7 include, without limitation, the obligation to conduct all audits required by the Act (Contractor's current reporting form as of the date of this Agreement is attached hereto as **Exhibit D**).

15.8. Amendments.

No amendment, supplement, or modification hereof shall be effective for any purpose unless the same is in writing and signed by both parties hereto, and the Contractor's assignee, if any.

15.9. Headings.

The headings of sections and subsections of this Agreement are for convenience of reference only and shall not constitute, affect the meaning, construction, or effect of, any provision hereof.

15.10. Entire Agreement.

This Agreement, together with the Contract Documents, represents the entire agreement between the parties hereto and supersedes all prior negotiations, representations and agreements whether written or oral. To the extent of any conflict between this Agreement and its Exhibits and the Specifications and Drawings, General Conditions and Supplementary Conditions, the terms and conditions of this Agreement shall prevail and supersede solely to the extent of any such conflict.

Authority to Execute Contract. This Contract is executed for City of West Lafayette, Indiana pursuant to a resolution of its Board, duly adopted at its regular meeting duly called and held on _____, 2015.

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APPROVED:

DATE: _____

**CITY OF WEST LAFAYETTE
BOARD OF PUBLIC WORKS
AND SAFETY**

John R. Dennis, Mayor (President)

Sana G. Booker, member

Bradley L. Cohen, member

Brooke E. Folkers, member

Jonathan C. Speaker, member

ATTEST:

Clerk-Treasure Judith C. Rhodes

Date: _____

BOWEN ENGINEERING CORPORATION

By: _____

Printed: A. Douglas Bowen

Its: President and Chief Executive Officer

ATTEST:

By: _____

Its: Secretary

EXHIBIT A

SCOPE OF WORK

Projects will be completed under the conditions of the EJCDC C-700 Standard General Conditions of the Construction Contract (No. 1910-8, 1996 Edition) (the “General Conditions”) as amended by the Owner’s Supplementary Conditions (the “Supplementary Conditions”). The Scope of Work shall be as set forth in the GMAX Basis for the Specifications, Drawings and Project Manual (the foregoing, collectively, the “Specifications and Drawings”), and as described below. The Specifications and Drawings, General Conditions and Supplementary Conditions are hereby incorporated into, and made a part of, this Agreement by this reference. Significant changes in scope of work will be documented by a Scope Modification Agreement.

Project: CSO Relief Interceptor (96” Interceptor Option) and Roadway Construction

The scope is based upon site visits, 60% project drawings dated 11/24/15 and specifications, and the clarifications listed below.

Project Schedule:

1. Sequence of Work/MOT is based upon Bowen’s written revised plan submitted on 11/30/2015. This will allow Bowen Engineering to be complete with work through and south of State Street by the desired date of 11/18/2016. Further modifications to this plan could impact the project costs and duration.
2. Bowen anticipates receiving the following release dates:
 - a. Limited Notice-To-Proceed for ordering long lead materials by December 22nd, 2015.
 - b. Full Notice-To-Proceed for beginning construction by February 2nd, 2016
 - c. Receipt of all permits by February 29th, 2016

Proposal Clarifications:

1. The scope does not include costs for acquiring right-of-ways, permits, or temporary and permanent easements.
2. Railroad inspection fees and railroad flagmen, if required, are excluded.
3. The costs of relocating existing utilities is excluded.
4. For reasons of safety, large diameter RCP will be joint tested in lieu of air pressure tested.
5. The carrier pipe will be braced within the casing utilizing rails and/or timbers in lieu of casing spacers to allow for a more precise line grade installation. Factory fabricated end seals are not available for casings of this size. Block bulkheads will be installed in the field.
6. SCADA programming for new instruments is to be performed by the City of West Lafayette.
7. The scope is based on the project being sales tax exempt.
8. The scope is based upon the assumption that the work will be performed during normal working hours. Holiday, weekend, and overtime costs are not included, except for the Interceptor crossing and restoration of State Street. While crossing State Street, crews will work 6-10’s to complete the work.

EXHIBIT B

PROPOSAL & OPEN BOOK STRUCTURE

This is a “Cost Plus a Fixed Fee” proposal with a “Guaranteed Maximum Price” or “GMP”. Exhibits B-1 is hereby incorporated by reference into, and made a part of, this Exhibit B. In exchange for payment by The City of West Lafayette to Contractor, Contractor shall complete, without exception, and shall furnish required process know-how, labor, supervision, materials, tools, equipment, transportation, permits, and incidentals to accomplish the Project, including, without limitation, the following:

- B-1. Construction Costs: The following project specific personnel costs including, but not limited to, Contract Manager, Project Manager, Project Engineer, Project Coordinator, Safety Manager, Corporate Safety Director (site visits only), General Superintendent (site visits only), Project Field Superintendent, Project Field Engineer are all eligible personnel. In addition the following project cost including, but not limited to, project materials, consumable materials, subcontracted work, heavy equipment usage, mobilization & demobilization costs, office/tool trailers, initial site surveying, construction laydown/parking area requirements, medium tools, dumpsters, drinking water, drawing/specification, reproductions, on-site phones, faxes, computers, printers, subsistence and other travel expenses, sanitary facilities and utility consumption charges are all eligible for reimbursement. Mobilization & demobilization is limited to 5% of construction cost on the schedule of values and the full amount will be billed in the first payment of application.
- B-2. Fixed Provider/Contractor Fee: Contractors fee for overhead and profit. The Provider/Contractor Fee will appear as a line item on the schedule of values and will progress on a percentage basis of project completion.
- B-3. Contractor’s Contingency: The Contractor’s GMP Proposal contains, as part of the estimated Cost of the Project, the Contractor’s Contingency, a sum agreed upon to cover costs which are properly reimbursable as a Cost of the Project, whether or not such cost is the basis for a Change Order. The Contractor shall regularly (no less than on a monthly basis during the term of this Agreement) provide The City of West Lafayette with an accounting of all charges against the Contractor’s Contingency.
- B-4. Final Report, Project Savings: At the time of Final Completion, the Contractor shall provide a Final Contract Price Report with an invoice to The City of West Lafayette that includes the cost of Project to date. If at such time the Final Contract Price is less than the Guaranteed Maximum Price referenced in Exhibit B-1, then the City of West Lafayette shall keep 100% of the savings.
Reports, referred to as buy sheets, will be given to The City by the Contractor monthly or bimonthly during construction documenting savings or losses.

Exhibit B-1
CONTRACTOR'S OPEN BOOK PRICING MODEL & PROPOSAL

Project: CSO Relief Interceptor (96" Interceptor Option) and Roadway Construction

Construction Cost	\$ 20,343,750
Fixed Provider/Contractor Fee	\$ 2,681,250
Construction Contingency	\$ 2,000,000
Guaranteed Maximum Price	\$ 25,025,000

EXHIBIT C

PERFORMANCE GUARANTEE

SAVINGS GUARANTEE

Bowen Engineering Corporation guarantees that the program described in the Guaranteed Energy Savings Performance Contract (the “Agreement”) to which this Performance Guarantee is attached as Exhibit C will recover a total of **\$32,498,520** in energy and operational savings during the first twenty (20) years of operation, beginning on the first day of the month following completion and final acceptance by the City regarding the installation of the equipment provided under the Agreement.

If, at the end of any year during the guarantee period, the program has failed to achieve the annual guarantee of energy savings, Bowen Engineering Corporation will pay the City the difference between the annual energy guarantee and the actual energy savings amount.

Energy savings that are achieved by the upgrades and the modifications in the Agreement prior to completion of the entire retrofit project (construction period savings) will be added to the first year actual annual energy savings amount.

Bowen Engineering Corporation and the City also agree that if the actual annual energy savings amount exceeds the annual energy guarantee amount, such excess energy savings amounts will be added to the savings for any future year before calculating the savings amount.

This guarantee, whether or not exercised, is Bowen Engineering Corporation’s sole liability with respect to any claim of energy savings.

METHODOLOGY

The savings are calculated using Microsoft Excel spreadsheets. All assumptions, variables, and equations are shown on each page. The total annual savings, including energy and operational, are stipulated between the City of West Lafayette and Bowen Engineering Corporation in the Agreement. Stipulated savings are savings that are agreed to be satisfied throughout the term of this performance guarantee. Any changes to the operation of the equipment or systems can be accounted for through calculation and the annual savings adjusted accordingly. The Tables below summarize the guaranteed annual savings from the calculations. This saving guarantee is dependent upon these conditions being met.

Any shortfall payments between the City and Bowen Engineering Corporation will be made within 90 days of the end of each annual period.

Table 1: Annual Savings Summary

ECM	Description	Energy Savings	Operational Savings	Total Annual Savings
1	CSO Relief Interceptor & Road	\$ 1,449	\$ 1,623,477	\$ 1,624,926

Table 2: Annual Guaranteed Savings by Year of Contract

Contract Year	Annual Savings (\$)
1	\$ 1,624,926
2	\$ 1,624,926
3	\$ 1,624,926
4	\$ 1,624,926
5	\$ 1,624,926
6	\$ 1,624,926
7	\$ 1,624,926
8	\$ 1,624,926
9	\$ 1,624,926
10	\$ 1,624,926
11	\$ 1,624,926
12	\$ 1,624,926
13	\$ 1,624,926
14	\$ 1,624,926
15	\$ 1,624,926
16	\$ 1,624,926
17	\$ 1,624,926
18	\$ 1,624,926
19	\$ 1,624,926
20	\$ 1,624,926
Total	32,498,520

Table 3: Street Lighting Energy Savings

SAVINGS CALCULATION					
City of West Lafayette, IN		Energy Conservation Measure: Provide higher efficient lighting for the Street Lighting on River Road			
Facility: City of West Lafayette Sewer Infrastructure					
Utility Provider: Duke Energy					
Knowns & Assumptions:		Street light coverage is increasing			
		Fixture Wattage includes Ballast			
		Existing fixture = 400W High Pressure Sodium			
		New Fixtures are LED with driver			
		Same usage before and after the relighting			
EXISTING LIGHTING					
ID	Fixture Number	Fixture Wattage	Usage (Hr.)	\$/kWh	Operational Cost/Yr.
Street Lighting	25	415	4380	\$ 0.06	\$ 2,726.55
			Electrical Consumption =		\$ 2,726.55
NEW LIGHTING					
ID	Fixture Number	Fixture Wattage	Usage (Hr.)	\$/kWh	Operational Cost/Yr.
Street Lighting	61	100	4380	\$ 0.06	\$ 1,603.08
			Electrical Consumption =		\$ 1,603.08
				COST SAVINGS =	\$ 1,123.47
				% Variability =	90%
				GUARANTEED ANNUAL SAVINGS =	\$ 1,011.12

Table 4: Traffic Signal Energy Savings

SAVINGS CALCULATION					
City of West Lafayette, IN			Energy Conservation Measure: Reduction of Traffic Signals due to the New Roundabouts		
Facility: City of West Lafayette Sewer Infrastructure					
Utility Provider: Duke Energy					
Knowns & Assumptions: At least one lamp is eliminated at all times					
Fixture Wattage does not include ballast					
EXISTING LIGHTING					
ID	Fixture Number	Fixture Wattage	Usage (Hr.)	Operational	
				\$/kWh	Cost/Yr.
Tapawingo 3 Lamp Signa	4.00	116	8760	\$ 0.06	\$ 243.88
Tapawingo 5 Lamp Signa	4.00	116	8760	\$ 0.06	\$ 243.88
				COST SAVINGS =	\$ 487.76
				% Variability =	90%
				GUARANTEED ANNUAL SAVINGS =	\$ 438.98
*Pedestrian Signaling would stay in place for both situations					

Table 5: Labor & Fuel Operational Savings

SAVINGS CALCULATION					
West Lafayette, IN		Energy Conservation Measure: The new Roundabout will decrease City Fuel usage and Man Hours			
Calculation Note: The new traffic configuration is the roundabout vs the existing stop/go signaling.					
Assumptions:	50% of the city vehicles will stop at the light				
	The stop will average 30 seconds				
	\$10/hr. cost per man hour				
	*Average Gallon of fuel Price = \$2.02/gal				
	(0.8 gal/hr) is assumed as the idling fuel consumption				
EXISTING SIGNALING					
ID	Trips per day	Annual Stoppage Time (hr)	Fuel Consumption	Annual Cost	
Fuel	100	108	87	\$	175.07
Man Hours	100	108	NA	\$	1,083.33
			COST SAVINGS =	\$	1,258.40
			% Variability =		90%
GUARANTEED ANNUAL SAVINGS =				\$	1,133
*Based on the National Daily average from AAA (12/9/15)					

Table 6: Capital Cost Avoided Operational Savings

FUTURE CAPITAL COST AVOIDED SAVINGS								
West Lafayette, IN								
ID	Description	RS Means Cost Data	QTY	Unit	\$/Unit	Value	% Replaced	Project Cost
1	Construction Costs	Historical Data	1	NA	NA	\$ 20,343,750	100%	\$ 20,343,750
3	Contingency	01-21-16.5-0150	\$ 20,343,750	Project	10%	\$ 2,034,375	100%	\$ 2,034,375
4	Overhead & Profit	01-91-13.80-0400	\$ 20,343,750	Project	20%	\$ 4,068,750	100%	\$ 4,068,750
2	Storage at WWTP	Historical Data	1	NA	NA	\$ 6,000,000	100%	\$ 6,000,000
TOTAL PROJECT COST=								\$ 32,446,875
Annualized Savings =								\$1,622,344
Given: Term (Years) = 20								
Notes:								
All data based on MS Means 2010 Building Construction Data Handbook or Historical Data								
Value = Qty x \$/Unit								
Term = life of the contract								
% Replaced = amount of system or facility that is affected through this project								

EXHIBIT D

SUPPORT SERVICES

ENERGY AUDITS

As part of the Energy Guarantee, Bowen Engineering Corporation agrees to complete the annual report to be filed with the Indiana Office of Energy & Defense (see example on this page).

Guaranteed Energy Savings Contract Annual Savings Report

Guarantee Period Covered by this Report (M/D/Yr): _____ through _____ Report Year: _____ of 10.

Institution:	Contractor:
Contact:	Contact:
Phone:	Phone:
Address:	Address:

Contract Dates: Signed: _____ Expires: _____

Project Dates: Initiated: _____ Completed: _____

Total Project Cost (with Financing): _____ Total Guaranteed Savings: _____

	(A) Baseline Constant (from contract)	(B) Actual Post-Project	(C)* Adjustment	(D) ** Savings (A-B+C)	(E) Guaranteed Savings (From Contract)	(F) Difference + or - (D minus E)
1. Energy Saved (MMBTU):						0
2. Energy Costs Saved:						0
3. Operating Costs Saved:						0
4. Total Costs Saved:				\$0	\$0	0
5. Total Thru Previous Years:				\$0	\$0	0
6. Accumulated Totals Thru This Period (4 + 5)				\$0	\$0	0

* **Note:** Provide attachment showing all assumptions (bill totals, measurement and verification, stipulations) and calculations used to determine adjustments.

** **Note:** If column A, B, or C are blank or the listed savings have not been calculated using actual utility bills and operating costs, the reported figures have been stipulated and represent an estimation of savings.

Total Square Footage of Buildings in GES: _____ Pre-project Energy Cost: _____

Buildings Included in Contract:	Savings Measures Included in Contract:
---------------------------------	--

Name and Organization of Person Filing this Report:

Approved by and Title of Authorized Institution Official:

Send annually to the Indiana Office of Energy and Defense Development, 101 West Ohio Street, Suite 1250, Indianapolis, Indiana, 46204 no later than 60 days after the anniversary of each savings guarantee period.
Questions? Call the Division at (317) 232-8939.

EXHIBIT E

PROJECT COMPLETION SCHEDULE

Through and South of State Street	11/18/16
Substantial Completion	12/31/16
Define Punch List Items	After Substantial Completion
Final Project Completion	5/31/17

*The above dates are contingent on Bowen receiving the following release dates:

Limited Notice-To-Proceed for ordering long lead materials by December 22nd, 2015.

Full Notice-To-Proceed for beginning construction by February 2nd, 2016

Receipt of all permits by February 29th, 2016

EXHIBIT F

FINAL ACCEPTANCE CERTIFICATE

(TO BE COMPLETED AND SIGNED AFTER INSTALLATION OF ALL ECM'S)

Bowen Engineering Corporation
8802 N. Meridian Street
Indianapolis, IN 46260

Re: Guaranteed Energy Savings Performance Contract, dated as of _____, 2015 (the "Agreement"), between Bowen Engineering Corporation (the "Contractor") and City of West Lafayette, Indiana (the "City").

Ladies and Gentleman:

In accordance with the Agreement, the City hereby certifies and represents to, and agrees with, Bowen Engineering Corporations follows:

All of the ECM's (as defined in the Agreement) comprising the Project (as defined in the Agreement) have been delivered, installed, and accepted as of _____ (the "Completion Date").

City has conducted an inspection and/or testing of the ECM's or other measures comprising the Project as it deems necessary and appropriate and hereby acknowledges that it accepts the Project for all purposes, subject to all terms and conditions of the Agreement.

No event or condition that constitutes, or with notice or lapse of time, or both, would constitute, a default , is known by the City to exist at the date hereof.

Sincerely,

City

By: _____
Name

Its: _____
City of West Lafayette

Date: _____